IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, TUNOI & SHAH .JA)

CIVIL APPEAL 174 & 175 OF 1994

CIVIL APPEAL NO. 174 OF 1994

TRADE BANK LIMITED (IN LIQUIDATION).....……APPELLANT

AND

L.Z. ENGINEERING CONSTRUCTION LIMITED.....…..RESPONDENT

(Appeal from a Ruling and an order of the High Court of Kenya at Nairobi (Hon. Mr. Justice Pall) dated the 14th February, 1994

IN

H.C.C.C. NO. 3791 OF 1993)

****

ALSO

CIVIL APPEAL NO. 175 OF 1994

BETWEEN

TRADE BANK LIMITED (IN LIQUIDATION).....……APPELLANT

AND

L.Z. ENGINEERING CONSTRUCTION LIMITED.....…..RESPONDENT

(Appeal from a Ruling and an order of the High Court of Kenya at Nairobi (Hon. Mr. Justice Pall) dated the 19th August, 1994,

IN

H.C.C.C. NO. 3791 OF 1993)

RULING OF THE COURT

By an application dated 24th April , 1997 the respondent to this appeal, L.Z. Engineering Construction Limited (hereinafter referred to as L.Z.) seeks orders to strike out Civil Appeal No. 174 of 1994 filed by Trade Bank Limited (in Liquidation) (hereinafter referred to as T.B.). The application is stated to be brought under Rules 42(1) and 80 of the Rules of this court (the Rules).

By a similar application of the same date L.Z. seeks striking out of Civil Appeal No. 175 of 1994, which appeal is also filed by T.B.

The two notices of motion filed by L.Z. do not follow the form prescribed by rule 42(1) which reads:

> "42 (1) Subject to the provisions of sub-rule (3) and to any other rule allowing informal application, all applications to the court shall be by motion, which shall state the

grounds of the application.

(2) A notice of motion shall be substantially in Form A in the First Schedule hereto and shall be signed by or on behalf of the applicant.

Whether L.Z. was entitled to state the grounds its motion in the affidavit, as opposed to stating them in the motion itself is a matter which was not seriously argued before us and we do not feel inclined to determine the application on that basis. For the purposes of our ruling we will treat the motion as having been properly brought before us and the question of its failure to state on its face the grounds upon which it is brought must await another occasion. The affidavit of Mr. Manek sets out the following grounds as the basis of the orders sought:-

> (1) Although Mr. Manek was served with a copy of the notice of appeal (marked "for information only") he was not served with a copy of the letter bespeaking the copies of proceedings and ruling appealed against so that the appeal itself was not filed within the time prescribed by Rule 81 of the Court of Appeal Rules
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> (2) Alternatively no notice of appeal was served at all on Mr Manek
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> (3) Yaya Towers Limited, who was the second defendant was not joined as one of the Respondents in the appeal and that the Memorandum and Record of Appeal was not served on Mr. Manek.

What Mr. Gautama's arguments turned on eventually, as regards the third ground set out above were, that an essential step was not taken in the proceedings by L.Z. within the prescribed time. The essential step which Mr. Gautama referred to was that L.Z. did not file any appeal against Yaya Towers Limited (hereinafter referred to as "Yaya") and Deposit Protection Fund Board (hereinafter referred to as "the Fund"), despite having served copies of notice of appeal on Yaya and the Fund. We would point out here that Mr. Manek asserts that Yaya is his client, but that question is still pending the decision of another court. Mr. Manek claims to have received instructions to act for Yaya from Mr. Esmail, who says he is a director of Yaya, whereas Mr. Deverall claims to have received instructions, on behalf of is firm, Kaplan & Stratton, to act for Yaya, from two persons namely Messrs. Raynor and Ndambuki (both of T.B.) who were allegedly appointed directors of Yaya on 7th February, 1992 by a resolution of Yaya. Incidentally Mr. Deverell, conceded before us from the Bar that meeting alleged to have taken place on 7th February, 1992 to appoint M/S. Raynor and Ndambuki as directors did not in fact take place.

We now come back to the alleged non-taking of the essential step which Mr. Gautama relies onto say that the appeal ought to be struck out. Rule 80 of the Rules reads:

> "80. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the court to strike out the notice or the appeal as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time."

The step not taken was, according to Mr. Gautama, as set out earlier by us, was that neither Yaya nor the Fund, were made respondents in the appeals despite their having been served the notice of appeal. Mr. Gautama argued that Yaya and the Fund became respondents as soon as the copies of the notice of appeal were served on Messrs. Hamilton Harrison & Mathews (for the Fund) and Mr. Manek (for Yaya) and that therefore the appeal was defective, notwithstanding the use of the words "for information only" on the copies so served. Mr. Gautama went on to say that as both Yaya and the Fund took part in the proceedings (applications for amendment of defences of first and second defendants, T.B. and Yaya and for striking out of certain portions of the defences of T.B. and Yaya), by entering appearances and appearing by their advocates they ought to have been made respondents in the appeal.

Mr. Deverell countered Mr. Gautama's argument on the point by pointing out that Yaya and the Yaya and the Fund were not concerned with the amendments sought (both ways, that is striking out and adding defences) and that therefore they were not parties directly affected by the appeal. Mr. Deverell took us through the portions of the record which according to him showed that Yaya and the Fund were not parties or persons directly affected by these appeals.

The proceedings in the superior court were commenced by L.Z. who alleged that T.B. had no right to deal with the assets of Yaya (shareholding in Yaya) as (inter alia) Messrs. Raynor and Ndambuki were never properly or at all appointed directors of Yaya and that therefore they had no right to charge the assets of Yaya to secure any indebtedness of Yaya to T.B. T.B. took the stand that it had correctly obtained the charge against Yaya's assets through Raynor and Ndambuki as directors of Yaya. T.B. then went on to seek amendments to its defence to include its alleged right to be the chargee by virtue of other acts of L.Z. which, according to Mr. Deverell, were post-plaint events and also acts constituting approbation by L.Z. as regards T.B.'s alleged rights to have the charge created over assets of Yaya.

The amendments as proposed and not allowed which are the subject-matter of Civil Appeal No. 174 of 1994 and the portions of defence of T.B. as struck out which are the subject-matter of Civil Appeal No. 175 of 1995, according to Mr. Deverell are of no concern to Yaya. He said it was not the concern of Yaya who its shareholders are. We find this an amazing argument. A company acts through its directors, and it must matter to it who its directors are. We think Mr. Deverell was not serious when he said it was not Yaya's concern. In order for a company to carry out its objects it has to have a board of directors and it must be a matter of extreme concern to a company to know who is going to control its affairs. The proceedings in the superior court were not in vacuum in so far as Yaya is concerned. It is in Yaya's interests to know who are its lawful directors and shareholders. The amendments refused and the portions of defence struck out go to the very core of the matter as to who the directors and shareholders of Yaya are and as to whether or not the charge in question therefore is valid or not. By no stretch of imagination can we say that Yaya is not a party directly affected by the result of this appeal. We are in full agreement with what Kneller J.A. said in the case of Abdul W. Sheikh vs Abdul Shakoor Sheikh and A.R. Sheikh (1982-88) 1 KAR 661 at page 664:

> "The point is this. The object of the rule and of the proviso is that the rights of a party likely to be directly affected by result of an appeal should not be affected without the party being provided with an opportunity of being heard. Ruthibo vs Nyingi, Civ App. 21 of 1982, 19 October, 1983 (Madan, kneller and Hancox JJ.A).
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> And it does not matter that Hameed, City Development or Pickwell, or parties affected by the appeal do not nurture any grievances or suffer any prejudice by not being served with the notice of appeal or appeal. The requirements of Rule 76 (1) and its proviso are mandatory. Roboi Holdings Ltd. Vs Shah Civ App 50 of 1982, 2 November, 1983 (Madan Kneller & Hancox JJ.A)."

What Kneller J.A. said (and there was concurrence thereto by Hancox J A, as he then was and Nyarangi J A) simply amounts to acceptance of the well known principle of natural justice, namely "Audi Alteram Partem". It does not matter if the fund is not concerned as to what happens. It does not matter even if Yaya does not care who its shareholders are (which of course is not the case). As both were defendants in the suit and as both were served with the application for amendment of pleadings and at least as Yaya through Mr. Manek attended all the proceedings in the superior court they were parties, in our view,

directly affected by the appeal. We do not think Mr. Deverell was joking when he served them with copies of the notice of appeal.

Mr. Deverell argues that these were only interlocutory appeals not creating finality of the situation as regards rights of all parties. That cannot be. Whatever this court decides, brings that much finality to the matters in dispute. There is no going back on these. If we were to allow the appeals the state of pleadings thus far would be final. The pleadings bind the parties who plead. The suit will be heard on the basis of pleadings as finally settled by this court on appeal and will bind the parties. By no stretch of imagination can it be stated that Yaya could or should not care less how the pleadings go.

Of course pleadings could be amended further but we are referring to pleadings which are before us now.

Paragraph 2 A of the amended defence and counterclaim (as originally drafted) alludes to there being, allegedly, no board of directors of Yaya in existence capable of passing a resolution to make an allotment. If that be the case, Yaya, is concerned.

Paragraph 10(aa) of the said amended defence and counterclaim refers to alleged ratification of acts of Messrs. Raynor and Ndambuki by an alleged unaminous resolution of shareholders of Yaya, and by the board of directors of Yaya. If these acts do not affect Yaya then we do not know what could ever affect it. The same observations would apply to the proposed amendments to paragraph 11 of the defence of T.B.

Technical defects, if any, in the registration, allotment or other aspects relating to the due vesting in T.B. or its nominee of any of the 50000 shares agreed to be sold, are sought to be corrected in paragraph 12 A of the proposed amended defence and counterclaim of T.B. by placing to the door of L.Z. the alleged contractual duty to take steps to rectify such defects as to vest the shares of Yaya in T.B. It must yet again be the concern of Yaya as to who owns its shares.

The proposed countercheck seeks the transfer of legal title to the issued share capital in Yaya to T.B. If this does not affect Yaya then we do not know what does.

We come to Civil Appeal No. 175 of 1994 which appeal, as stated earlier, is against orders made by the learned judge striking out certain paragraphs of the defence of T.B. A scrutiny of the paragraphs sought to be struck out shows quite clearly that the alleged resolution of the board of directors of Yaya passed on 7th February, 1992 affects wholly the interests of Yaya as a company. It is of no consequence now in view of Mr. Deverell's concession that such meeting never took place.

Paragraph 10 of the proposed amended defence refers yet again to actions of Raynor and Ndambuki in their alleged capacity as the then directors of Yaya. The alleged provisional allotment of 45000 shares in Yaya (if ever there was any) certainly affects the interests of Yaya.

At all stages in the two applications before the learned judge, which applications are the subject-matter of the two appeals before us, the pivotal issue is: who owns Yaya's shareholding? This pivotal issue is of concern to Yaya. Yaya's future depends on it. We cannot accept Mr. Deverell's argument that Yaya is not concerned with knowing who owns its shares.

Having concluded that Yaya is a party directly affected by the appeals we do not have to consider if the Fund is a party directly affected by the appeals. We say in passing that the Fund must be very much concerned with the appeals as the Fund's right, if any, of recovery of any money which might have been paid by it to T.B. on behalf of Yaya would very much depend on who the proper directors of Yaya were at the material time.

These factors are of importance in this litigation even though the appeals before us are interlocutory. In this regard, there is no distinction between a final and interlocutory appeal as the pronouncements by this court, even on an interlocutory appeal will, to a certain extent, determine the rights of the parties.

An intended appellant ought not to take upon himself the onus of deciding whether or not a person will be

directly affected by an appeal. In the circumstances of this appeal, it was particularly unwise for Mr. Deverell to take upon himself the determination of the issue of whether or not Yaya was a party directly affected by their appeals. As we pointed out earlier there is a serious conflict between Mr. Manek and Mr. Deverell's law firm as to who, as between the two off them, is the legitimate counsel for Yaya. We would have thought that in those circumstances it was clearly Mr. Deverell's duty to invoke the jurisdiction of the court created by the proviso to Rule 76 (1) which precisely deals with the problem. The rule reads:

> "76(1) Any intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal (emphasis added).
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> Provided that the court may on application, which may be made ex-parte within 7 days after lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court."

The appellant did not invoke this proviso to obtain relevant directions from the court. However, it is clear to us, that Yaya took part in the proceedings before the superior court, through Mr. Manek.

Yaya and the Fund being directly affected by the proceedings in the superior court ought to have been made parties to the appeals.

Mr. Deverell has taken issue with the requirement of service of records of appeals on Yaya and the Fund as both did not file a notice of address for service as required by rule 78(1). His argument was that he was not obliged to serve the records on Yaya and the Fund because they failed to furnish notice of address for service. True, there is no obligation on an appellant to serve record of appeal on a respondent who has not filed a notice of address for service, filing whereof is mandatory in terms of rule 78 of the Rules. But filing of an appeal against a party directly affected by the appeal is mandatory. What will happen when no notice of address for service is filed is that the appellant may not serve the record of appeal on the respondent who has not filed a notice of address for service. But that does not entitle an appellant to say he need not file an appeal against such respondent.

We would accept what was said by Cotton L.J. in the case of In re Salmon, Priest v. Uppleby (1889)12 Ch D. 351 at page 362. He said:

> "It is the duty of the appellant to make his appeal perfect, and there being no rule requiring the respondent to serve a third party, I think it is the duty of the appellant to do so."

Mr. Deverell urged that should we come to the conclusion that Yaya and the Fund are parties directly affected by the appeals we should not strike out the appeals but order the appellant to serve records of appeals on Yaya and the Fund, as was one in the case of Sanitary Equipment & Builders v. Nairobi City Commission (1991) 2 KAR 238. The third holding in that case reads:

> "3. Ordinarily, the court would not hesitate to strike out the appeal in view of the gross error, but in the circumstances, particularly in view of the applicants' equally gross error in attempting to implead the bank, further time would be given to allow the respondents to put in a fresh notice of appeal, naming the correct party as directly affected thereby".

It is clear that ordinarily an appeal must be struck out if an essential step is not taken, leaving the party concerned to take such corrective steps as it may wish to take. We are not minded in the peculiar circumstances of these appeals to depart from the usual practice of striking out as it should have been obvious to the appellant that Yaya and the Fund were parties directly affected by the appeal. If it was not so obvious to them Mr. Deverell ought to have sought the direction of the court on that issue.

The upshot of all this is that the two appeals in question are incompetent and are ordered struck out with costs. We also award the costs of the motions to the applicants.

Dated and delivered at Nairobi this 8th day of May, 1997.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL